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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-381

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ,

Petitioners,

vs.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents.

REPLY OF PETITIONERS

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After acknowledging in summary fashion the sharp conflict existing among the Circuits (and even adding the Tenth Circuit to the fray), Respondent Home Federal Savings argues that certiorari should be granted, if at all, in the *Eisen* case, but not in the case at bar. Home argues (Home Brief p. 7) that *Eisen,* by reason of the Second Circuit's detailed opinion and that court's allegedly "illogical[ly] extreme" view on class action appeals, is ripe for

this Court's consideration. It may well be that certiorari ought to be granted in *Eisen,* but that does not bear adversely upon whether Petitioners' case should also be granted review.

In *Eisen* (No. 73-203) the Petitioner is a plaintiff who asserts that the trial court's order *granting* class status to plaintiff is not appealable by defendant. The *Eisen* Petitioner's argument undoubtedly will be that the "death knell" doctrine cannot be used to import finality into an otherwise interlocutory order inasmuch as an order granting class status does not, for all practical purposes, terminate the case,—indeed, the opposite is true since class status permits the case to go forward.

In the case at bar, of course, plaintiff class status was *denied,*—and it is this denial which for all practical purposes terminates the action and thus calls for invocation of the "death knell" doctrine. To argue that certiorari should be granted in *Eisen* and therefore not granted in the instant case is a non-sequiter. The theory of the death knell doctrine is simply not applicable to *Eisen.* If symmetry is deemed desirable in determining whether the death knell doctrine has vitality and the scope of its application, possibly certiorari should be granted in *Eisen* (No. 73-203), *Lupia* v. *Stella D'Oro Biscuit Co., Inc.,* (No. 73-307) and in the case at bar. It is submitted, however, that of the three certiorari petitions now pending before this Court, only the case at bar squarely presents the death knell issue. This is so because of the miniscule amount of money involved in the individual claims (in contrast to the $700,000 constituting the named plaintiff's claim in *Lupia*) and because class action status was here denied (in contrast to *Eisen* where it was granted).

Respondent Home further argues (Home Brief p. 8) that it has special status because of the nature of its business and the harm that notice to the class will inflict upon that business. Aside from the fact that such an argument is directed to the substantive issue as to whether there should be a class action, this argument has already been rejected. *Miller* v. *Mackey International, Inc.*, 452 F.2d 424, 428-29 (5th Cir. 1971).

Respondent Home also seeks to imply that plaintiffs have completed discovery. Such is not the case. At an early stage of this litigation the trial judge, upon defendants' motion, referred this case to the Federal Home Loan Bank Board upon grounds of primary jurisdiction and ordered discovery to be stayed. Prior to the stay order, however, the defendants deposed several of the plaintiffs, including the two plaintiffs having deposits in Home Federal. The Federal Home Loan Bank Board declined jurisdiction approximately a year after the referral, and the case was then again placed on the court's active calendar. Since class status remained undecided at the time the Federal Home Loan Bank Board declined jurisdiction, the plaintiffs could not economically embark upon a discovery program and, of course, the same was true when, finally, plaintiff class status was denied. In any event, plaintiffs have had *no* pretrial discovery.

One last point: Respondent Home sets forth a series of supposed "facts" which the two plaintiffs who were depositors in that savings and loan association (and only those particular plaintiffs) are asserted to have admitted. Lest the Petitioners' silence be construed against them, and out of an abundance of caution, these "facts," which go to the substance of the claim itself, and not to the question of

whether this Court should grant review, are less than accurate as presented. These "facts" are denied by Petitioners and hopefully, after trial, the jury will agree with Petitioners' position.

Respectfully submitted,

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